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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

1). Was the petition for the writ of certiorari timely brought as provided for by the Revised Rules of this Court, Rule 22, subdivisions 1 and 2?

2). Was the search of a student's school locker by the vice-principal of the school violative of the Fourth Amendment?

Statement

There was no trial of this matter, but the evidentiary facts out of which this violation arose are adequately set forth in the suppression hearing held before the Court of Special Sessions on February 25, 1965, and March 1, 1965. Where numerical references are used they refer to pages of the Record on Appeal.

On December 21, 1964, detectives of the Mount Vernon Police Department secured a search warrant which purported to authorize them to search the persons of the respondent and one George Cabell, Jr., the automobiles owned by the parents of the two, the home of each and the school locker of each (9, 10). Armed with this warrant, three Mount Vernon detectives, Pappas, Arrington and DiMarzo, went to the Mount Vernon High School (100). When they arrived there they went directly to the office of the vice-principal, Dr. Adolph Panitz. Dr. Panitz was at a meeting of the Board of Education (140), but he was reached by telephone, and he returned to the school (45).

When Dr. Panitz arrived, the search warrant was displayed to him (141), and he went to the school cafeteria, located Cabell and the respondent, and then went and brought the three detectives to them in the cafeteria (46). The detectives brought the two youths back to Dr. Panitz's office and required them to empty their pockets. After what seems to have been a brief interrogation the school custodian, a Mr. Tuccillo, accompanied the Cabell boy and Dets. Arrington and DiMarzo to Cabell's locker, leaving Dr. Panitz, the respondent and Det. Pappas in the office (46, 70). Pappas asked the respondent a few questions in Panitz's presence. Among those questions were these two: "If we go to your locker will we find anything", and the answer to that by the respondent was a shrug (103). The detective then said to him, "I am pretty sure if we go to

your locker we're going to find something'' (103). Testimony varied as to the respondent's reaction to this. Pappas said he said either ''I guess so'' or ''Maybe'' (103). Dr. Panitz, however, recalled that he nodded (47).

When shortly thereafter the other two detectives, Cabell and the custodian returned to the office, presumably having searched Cabell's locker in the interval, Pappas, Panitz, the respondent, the custodian and DiMarzo went to the respondent's locker, leaving Arrington and Cabell in the office (47, 142). Dr. Panitz opened the locker with a master key and a jacket was observed hanging in it. Pappas asked the respondent if the jacket was his, and on receiving an affirmative answer he searched the pockets and found four marijuana cigarettes (76-80, 104).

What remains of the facts of this case following the recovery of the cigarettes is not germane to this appeal, but just to tidy up the narrative and not leave it in mid-air, the respondent was then arrested and taken to Mount Vernon Police Headquarters where he gave a statement and was charged with the possession of the cigarettes (105-106, 144).

Thereafter the respondent moved in the Court of Special Sessions for an order vacating the search warrant and the suppression as evidence of the marijuana (13, 14), and an evidentiary hearing was ordered thereupon (24). There then followed the hearing from which the foregoing facts were taken (32-213). At the conclusion of this hearing the Court of Special Sessions, Honorable John P. Griffith, C. J., vacated the warrant but nevertheless denied the motion to supress the evidence on the theory that, while the police may not have had the right to search the locker, Dr. Panitz, as the representative of the Board of Education, did have such a right (215-216). This is the determination with which the Appellate Term could not agree and the basis on which the adjudication was reversed (242).

However, on appeal to the New York Court of Appeals, the order of the Appellate Term was reversed, and the matter was remanded to that Court for a consideration of the further points raised by Overton before that Court. By its order of March 22, 1968, the Appellate Term affirmed in full the adjudication of the Court of Special Sessions of the City of Mount Vernon.

POINT I

The petition for the writ of certiorari was not timely filed.

The sole question presented to the Court by this petition as to which it is asked to exercise its discretion is the propriety of the holding by the New York State courts that in the circumstances presented by this appeal the vice-principal of the Mount Vernon High School had the constitutional right to inspect the petitioner's school locker and the contents thereof. Without going into the merits of that question, because it will be discussed fully at Point II, *infra*, it is submitted that this issue was finally, irrevocably and irretrievably decided by the New York Court of Appeals on July 7, 1967, *People* v. *Overton*, 20 N. Y. 2d 360. In point of fact, it was the only issue the Court of Appeals considered. On that Court's remand to the Appellate Term, there wasn't the remotest possibility of any contrary determination of the point. That, then, not now, was the time to bring the matter to this Court, and, in terms of Rule 22, the petitioner's time within which to do so terminated on October 5, 1967. Again in terms of Rule 22, the maximum extension of that time which he could have been allowed, had he applied for it, and he didn't, would have been sixty days or until December 4, 1967. He thus failed by more than half a year to meet the optimum deadline.

The petitioner takes the view that the determination of the Court of Appeals was not final and that the final order in the case came from the Appellate Term on March 22, 1968, when it affirmed his adjudication as a Youthful Offender. Even adopting that view, which we regard as specious because, as we have pointed out, the Appellate Term was totally without authority to review the only question presented to this Court, but even adopting that view, the petition is untimely. Rule 22(1) deals, as the Court knows, with a state court of last resort, and as to such a court's determination the ninety day time limit applies. The Appellate Term, however, is an intermediate appellate court, so as to that Court, Rule 22(2) applies, and, again not to instruct this Court, the thirty day limitation obtains. Therefore, calculating from March 22, 1968, the date of the affirmance by the Appellate Term, the petitioner's time within which to file this petition expired on April 21, 1968, or, taking it over to the next following business day, April 22nd. If he had applied for it, and, again, he didn't, he might have gotten a thirty day extension, Rule 22(2), until May 21, 1968, but after that date this Court was without jurisdiction to entertain the petition.

In a letter to this Court dated June 25, 1968, petitioner's co-counsel, David C. Gilberg, Esquire, stated:

> "In my opinion, there would have been no purpose gained by applying for leave to appeal to the Court of Appeals from the matters remitted to the Appellate Term and affirmed by it."

In other words, there was a calculated determination by petitioner or his legal advisors not to take this case to the Court of Appeals, New York State's court of last resort. This has more than a casual significance, because it tends to show that he too regarded the decision of the Court of Appeals of July 7, 1967, as conclusive of the ques-

tion of the validity of the search, and it brings into serious doubt his claim that the March 22, 1968 decision of the Appellate Term was the final order on that point.

Following our letter to this Court of June 20, 1968, a copy of which was sent to Mr. Gilberg, in which we pointed out that no appeal had been taken to the Court of Appeals, the petitioner on July 11, 1968 made application for permission to appeal to the Court of Appeals. It was months too late, though, New York Code of Criminal Procedure, § 521, and, predictably, on July 29, 1968, that permission was denied by Honorable Kenneth B. Keating, Associate Judge of the Court of Appeals.

The petitioner freely chose not to go to the Court of Appeals with this case at the time when he could and should have done so, and at the same time, he allowed his time within which to bring this petition to expire. He now seeks to confer jurisdiction on this Court by attempting to breathe new life into this wholly lifeless case with a frantic, and foredoomed, application to the Court of Appeals whose ruling he can then show this Court as indicative of the continuing vitality of the whole case. It is submitted that he should not be permitted to do so.

POINT II

The search of the petitioner's locker was valid, and the evidence was rightly held to be admissible.

This entire question hinges, it is submitted, on whether or not Dr. Panitz, as the representative of the Mount Vernon Board of Education or as the vice-principal of the Mount Vernon High School, had the right to enter and search the locker assigned for his use to the petitioner by the Board or by the High School. We submit he had. We acknowledge, to take as many issues out of the case as possible, that the search warrant was properly

vacated. The affidavits in support of the warrant (6-8) made absolutely no reference to the petitioner's school locker, and there is nothing therein contained which would justify the issuing magistrate in believing that a search of the locker should be authorized. We also acknowledge that a search of the locker by the police alone would be invalid without a warrant. We submit, however, that a search of the locker by Dr. Panitz was in every way proper.

The respondent argued before the State Courts and presumably will argue again before this Court that Dr. Panitz, when he searched the locker, was acceding to the mandate of the search warrant and was therefore not of his own authority conducting such search. It is submitted that this argument is insupportable in view of Panitz's plain renunciation of that suggestion. The following dialogue between the doctor and the prosecutor appears at page 93 of the Record:

> "Q. Now, I recall, in answer to a question put to you by Mr. Gilberg concerning this search warrant, that the question, in substance, was, 'Did you rely upon that search warrant?' and your answer, in substance, was, 'Not entirely.' Do you recall that? A. Yes, I do.
>
> Q. Will you tell the Court what you meant by 'not entirely'? A. Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker."

We may therefore confine ourselves to a discussion of Dr. Panitz's right to inspect the locker, the conclusion being unavoidable that he was exercising such a right.

In the City of Mount Vernon title in all school buildings and property is vested in the Board of Education (38), and the administrators of the various schools operate them in the capacity of owner's representatives (38-39), and in

Mount Vernon High School that function is exercised by Dr. Adolph Panitz. Under his direction and supervision desks and lockers are assigned to students for their use (39-40). There are regulations governing the use to which the facilities may be put, and these regulations prohibit, among other things, the storage of material which is violative of the law (41).

Dr. Panitz testified that as vice-principal of the high school his responsibilities included the maintenance and supervision of the buildings, the grounds and the physical equipment of the school and that among his other duties was the assignment of lockers to students (48). He described the assignment of lockers. At the beginning of each school year all the school locker combinations are changed. The locker number and the combination of the locker are endorsed on a perforated card in such a way that when the card is divided each number is on each piece. The assignment consists of allocating one locker to each student, at which point a note of the assignment is made and the card is divided. The student retains one-half, and the home room teacher the other, and the second half thus becomes a part of the school records. This is done because it is the school's responsibility to have access to such lockers at all times (49).

In addition, each locker can be opened by a master key of which Dr. Panitz had one of the only two and the head custodian the other, and from time to time these lockers were opened by one or the other of these men (50). The students are aware that their lockers are subject to being opened by the school authorities as demonstrated by their giving the school the second half of the locker assignment card bearing the combination (51). Regulations on what may be kept in the lockers are communicated to the students, although it did not appear affirmatively that the petitioner knew these regulations (52-53), and the authorities are given the right to open school lockers to enforce the proper utilization of these facilities (48).

In this atmosphere, then, and despite these regulations, the petitioner insists that the school authorities did not have the right to inspect the contents of his locker. One of the arguments he made in the State courts was that the school assigned the locker to him for his use exclusively, and no doubt that is true, but the generic sense of the word amply limits the measure of that exclusiveness. If one questions who is to be excluded it becomes instantly apparent that only other students were to be denied access to the locker. Each year the combination to each locker was changed, and five years would elapse before a given combination to a particular locker would be repeated. No student could pass on his combination for last year's locker, because it would not be the same (49), and the five year cycle patently was intended to insure that throughout a student's entire high school career the combination to any specified locker would never be the same. However, notwithstanding these elaborate precautions to insure the student's privacy, every year every student routinely surrendered the combination to his locker to the school authorities (49). Palpably, the concept of exclusiveness of access to the lockers did not restrict the school administrators in the performance of their duties. This is further exemplified by the master keys kept by Dr. Panitz and the head custodian.

This thesis does not need to be belabored because it is at the heart of every inquiry as to the propriety of a search, but both the United States Constitution (Amendment IV) and the New York State Constitution (Art. 1, § 12) condemn only unreasonable searches. Therefore, while we reject as unreasonable a general and uninhibited right to search a person, we must at the same time acknowledge that conditions can exist which make such a search acceptable. For example, who would deny the right to search an accident victim for means of identification? This is even anticipated by many people as demonstrated by their carrying a card in their wallets

designating who is to be notified in an emergency and sometimes asking that a clergyman be called.

Therefore, the question that must be answered here is whether the inspection of the petitioner's locker by the vice-principal was unreasonable. This Court said in *Go-Bart* v. *United States,* 282 U. S. 344:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

and in *Terry* v. *Ohio,* —— U. S. ——, 88 S. Ct. ——, 20 L. E. D. 2nd 889, 899

> ". . . wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361, 19 L. Ed. 2d at 588 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' Elkins v. United States, 364 U. S. 206, 222, 4 L. Ed. 2d 1669, 1680, 80 S. Ct. 1437 (1960)."

The facts and circumstances of this case, it is submitted, indicate that this search was far from unreasonable. The respondent at the time of this search was a youth seventeen years of age and a senior in high school (78). In the contemplation of the law he was an infant. As an infant, he was precluded from exercising certain of the rights that come with majority. He can not marry, for example, without parental consent, New York Domestic Relations Law, § 15; he may be disciplined by the reasoned use of force, New York Penal Law (1909), § 246(4); he is prohibited from buying intoxicants, New York Alcoholic Beverage Control Law, § 65. There are many other illustrations which we could use, but we believe we have made the point; the privileges enjoyed by a minor are not absolute.

All of this is not to say, of course, that a minor may be searched with impunity by police officers or the public at large, but there is a certain limited class of persons to whom he must remain subservient and who, in the proper exercise of their tutelary authority over him, may deprive him of certain of the rights he may demand from others. Obviously, his parents or legal guardians would fall into this class, and if the reasonable control which they may validly exercise over his activities slips or seems in danger of slipping the courts will step into the picture and re-establish it, New York Code of Criminal Procedure, §§ 913-a to 913-d.

It is widely recognized that a parent who retains dominion over given premises to which the child also has access may consent to a search of such premises, even that portion which is set aside for the child's use, *Dalton* v. *Indiana,* 230 Ind. 626, 105 N. E. 2d 509. See Annotation, 31 A.L.R. 2d 1078, § 3. See also *Marlar* v. *Bill,* 181 Tenn. 100, 178 S. W. 634; *Rees* v. *Payton,* 225 F. S. 507, aff'd 341 F. 2d 859; *Rees* v. *Commonwealth,* 203 Va. 850, 127 S. E. 2d 406, cert. denied 372 U. S. 964; *State* v. *Carder,* 9 Ohio 2d 1, 222 N. E. 2d 620; *Commonwealth* v. *Hardy,* 423 Pa. 208, 223 A. 2d 719; *State* v. *Kinderman,* 271 Minn. 405, 136 N. W. 2d 577, cert. denied 384 U. S. 909; *Maxwell* v. *Stevens,* 229 F. S. 205, 348 F. 2d 325, cert. denied 382 U. S. 844; *McGray* v. *State,* 236 Md. 9, 202 A. 2d 320; *Commonwealth* v. *McKenna,* 202 Pa. Super. 360, 195 A. 2d 817; *Williams* v. *State* (Tex. Crim.), 298 S. W. 2d 590; *State* v. *Haggard,* 89 Idaho 217, 404 P. 2d 580.

It is submitted that in and upon school buildings and grounds during normal school hours, school authorities must have corresponding authority to that of the parents over their pupils, for they exercise corresponding functions. They act, in every sense of the word, *in loco parentis.* They undertake the responsibility not only of educating but of maintaining order among large groups of children. The law specifically recognizes their right to inflict corporal

punishment, New York Penal Law (1909), § 246(4), and, very pointedly, the law confers that authority on no one other than teachers and parents.

The petitioner urges that the rule laid down by this Court in *Bumper* v. *North Carolina*, —— U. S. ——, 20 L. Ed. 797, S. Ct. ——, be broadened to include this present situation. They are not governed by the same principle, it is submitted. It is probably a fair appraisal of the *Bumper* case to say that, had it not been for the search warrant shown to her by the police, Bumper's grandmother would not have permitted the search. Assuredly, she would not have conducted a search herself. In the petitioner's evaluation of this matter, i.e., that Dr. Panitz bowed to the authority of the warrant, he may feel justified in arguing that, but for the warrant, there would have been no search and so equating this and the *Bumper* situations. In that assertion, however, it is submitted he is incorrect. In this case we have a responsible school administrator to whom has been reported by the police the well-grounded belief that one of his students is presently in possession of narcotics. Pursuant to a warrant, that student is brought to his office and searched. Following that search and right in Panitz's presence, the following occurred:

> "Q. That's with reference to Cabell. Now, respecting the defendant Overton? A. He remained in my office with another police officer who began to question him. During the questioning somewhere, the problem came up, or the question came up, whether he had possession of marijuana. He did not answer. Then the officers pursued the questioning, and said something about looking in his locker. 'You have it in your locker.' Thereupon, Overton sort of nodded.
>
> Mr. Gilberg: I move to strike out 'sort of.'
>
> The Court: He's indicated what he did, the way he nodded his head.
>
> Mr. Gilberg: All right.

By the Court:

Q. Is that the exact physical motion he made? A. That's right." (46-47) (Testimony of Dr. Adolph Panitz.)

Despite this clear admission by the petitioner in Panitz's presence that narcotics were concealed in the school building, he would nevertheless have this Court believe that Dr. Panitz, whose clear responsibility it was to prevent such activities (41, 48), stands in the same position as Mr. Bumper's grandmother and would not independently and on his own authority have searched the locker. Such a contention flies in the face of both reason and experience.

More than that, the thesis is flatly contradicted by Dr. Panitz himself who, when questioned on the point, said:

"Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker." (93)

Dr. Panitz, it is submitted, can not be identified, even superficially, with Mr. Bumper's grandmother.

The petitioner seeks also to draw an artificial distinction between the school's right, a right, incidentally, the existence of which he seems almost to concede, to inspect a locker and its right to inspect the contents of that locker, represented in this case by his coat. It is obviously not a matter of unconcern to the respondent, but this Court, it is submitted, ought to take a forthright stand one way or the other. Either a school official has the right *effectively* to inspect a student's locker or he hasn't, and the imperatives of effective inspection are not satisfied by a license to open the locker door and simply to peer in. The petitioner seeks to make much of the theory that what was

examined was his coat, a piece of wearing apparel. We believe that the Court will agree that if the petitioner were to drape himself in a bedsheet it would be, in the use to which it was being put, immune from a search. If, however, he were to hang the same bedsheet immediately inside his locker door in such a way as still to conceal the locker's contents after the door was opened, we can not believe that the Court would authorize the opening of the locker door and at one and the same time prohibit the pushing aside of the sheet. It is only a simple exercise in logic to demonstrate that, where there is the power to give a command, there must be the correlative power to enforce obedience to it. That being so, if there is reposed in the Board of Education the power to regulate what may be stored in the lockers of the Mount Vernon High School, and manifestly there is (53), then there must be the power to effectuate those regulations, and an inspection of the lockers is the only realistic way of doing so.

Lest the Court believe that there is something sacrosanct about a locker per se, its attention is respectfully directed to the California case of *People* v. *Shepard,* 28 Cal. Rptr. 297. In that case, the locker of a sailor was opened by the police with the consent of a Marine Corps officer, and the California Appellate Court upheld the validity of that search.

With the exception of *People* v. *Shepard, supra,* which is not directly in point because it does not involve a pupil-teacher relationship, the present case, as far as we have been able to ascertain, is one of first impression both in New York and in the United States. For that reason, we venture to suggest to the Court that, while it is not paramount, a consideration of policy enters into this case. All over the United States, while regulations and standards vary, parents are compelled under pain of some punishment to send their children to school; see, for example, New York Education Law, Article 65, Part I. Every day

millions of children troop off to thousands of schools, and, at least in New York, and we suspect everywhere else, anyone who attempts to interfere with a child's doing so can be imprisoned, New York Education Law, § 3228. And to what do they troop off, to a day of liberty and license the scope of which is measured only by the limits they choose to put upon it, ungoverned and unrestricted by any meaningful supervision by the school authorities? The average parent would insist upon a more authoritarian babysitter. If a teacher hasn't got the prerogatives necessary to keep potentially lethal drugs out of the hands of her students, then the only alternative remaining to the conscientious parent is to withdraw his child from school. Since he can not by law do so, neither alternative is acceptable. It is submitted that the unique relationship which exists between the teacher and the pupil amply warrants the former in doing what Dr. Panitz did here.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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